IN THE

Supreme Court of the United States

October Term, 1968

No. [redacted] 24

FEDERAL TRADE COMMISSION,
Petitioner,

v.

TEXACO INC. and THE B. F. GOODRICH COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS TEXACO INC. AND THE B. F. GOODRICH COMPANY

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Opinions Below

The opinion of the Court of Appeals is reported at 383 F. 2d 942 and is printed as Appendix A of the Petition (21-40). The most recent opinion and final order of the Federal Trade Commission are not officially reported but are printed as Appendix B and Appendix C, respectively, of the Petition (41-66). The prior opinions of the Court of

Appeals and of this Court are reported at 336 F.2d 754 and 381 U.S. 739. The prior opinions of the Federal Trade Commission are reported at 58 F.T.C. 1176 and 62 F.T.C. 1172 and are reproduced at JA 175 and JA 302.[1] The Initial Decision ("I.D.") and the Revised Initial Decision ("Rev. I.D.") of the Examiner are reproduced at JA 153-71 and JA 200-33, respectively.

Jurisdiction

Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1). The judgment of the Court of Appeals was entered on September 25, 1967.

Question Presented

Stripped to its essentials, the petition asks this Court to determine whether the Court of Appeals was right or wrong in its assessment of the sufficiency of the evidence in this case. Although petitioner adroitly seeks to create the impression that the court below departed from the principles which this Court enunciated in *Atlantic*[2] and in so doing created a conflict with the Fifth Circuit's decision in *Shell*,[3] the truth of the matter is that the court below, reviewing the record in this case for the second time,[4] made clear that it was conducting its review with-

1. JA refers to the printed Joint Appendix, JAX refers to the exhibit volumes of the Joint Appendix, and SJA refers to the Supplemental Joint Appendix, filed in the Court of Appeals.

2. *Atlantic Refining Co.* v. *FTC,* 381 U. S. 357 (1965).

3. *Shell Oil Co.* v. *FTC,* 360 F.2d 470 (5th Cir. 1966), *cert. denied,* 385 U. S. 1002 (1967).

4. On the second review, Chief Judge Bazelon replaced Judge Washington.

in the legal framework outlined by *Atlantic* and *Shell*. Because, in its unanimous judgment, there had been a failure of proof by petitioner on the crucial issues of exercise of economic power and competitive effects, the Court of Appeals drew a distinction between this case and the other two—as, indeed, petitioner itself had once drawn when it issued orders in *Atlantic* and *Shell* and simultaneously remanded this case for the reception of additional evidence which was never forthcoming. The real question for decision, therefore, is as follows:

> Whether the Court of Appeals, in reviewing the record in this case in light of *Atlantic* and *Shell*, made a clearly erroneous determination when it found that the record as a whole did not support petitioner's conclusion that Texaco exercised dominant economic power to cause its dealers to purchase sponsored tires, batteries and automotive accessories with resulting anticompetitive effects.

Finding that the record did not support petitioner's disposition of the merits of the controversy, it was unnecessary for the Court of Appeals to deal with the further grounds raised below by respondents which independently compel the termination of this proceeding. Those grounds relate to petitioner's abuse of the administrative process throughout this unduly protracted case in violation of the Administrative Procedure Act and of the due process requirements of the Constitution. Thus, in addition to the question presented above, respondent respectfully reserves its right to present these issues for determination should it become necessary to do so.

In the interest of clarity, it is to be noted that there was one ruling below as to which no question is presented

for review. With no word of attempted justification or explanation, the Commission had included in its order against Texaco two provisions regarding coercive conduct, unrelated to the sales commission program.[5] Independently of its holding on the sales commission issue, the Court of Appeals made clear

> "* * * our view that the coercion aspect of the Commission order has no basis in law, or the record. Since we have *twice* determined there is no basis that Texaco overtly coerced any substantial number of dealers or that a pattern of coercion existed, the provisions of the order prohibiting such coercion were and are baseless" (App. A, p. 40, n. 16; emphasis supplied).

The petition for certiorari makes no claim of error with respect to this determination, and the Court of Appeals' decision as to it is thus final.[6]

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5. Paragraphs 5 and 6 of the order (JA 231-32, SJA 165).

6. In *Atlantic*, paragraphs 5 and 6 of the Commission's order were also not before this Court but for precisely the opposite reason. This Court observed at the inception of the *Atlantic* decision:

> "Since Atlantic has not sought review of paragraphs 5 and 6 of the Commission's order as to its use of overt acts of coercion on its wholesalers and retailers those portions of the order are final" (381 U. S. at 363; SJA 60).

It was further noted:

> "* * * Atlantic has conceded the point [coercion] by not perfecting an appeal thereon" (381 U. S. at 367; SJA 64).

In *Shell*, the Court of Appeals for the Fifth Circuit eliminated paragraphs 5 and 6 from the order against Shell, and no review from this ruling was sought by the Commission. The petition does not tell the whole story when it states at page 3 that the Fifth Circuit "sustained the Commission's order against" Shell and Firestone.

Statement of the Case

On January 11, 1956, the Federal Trade Commission filed three virtually verbatim complaints: one commencing this case against Texaco and Goodrich; another against the Goodyear Tire and Rubber Co. and The Atlantic Refining Co. (Dkt. No. 6486); and the third against The Firestone Tire & Rubber Co. and Shell Oil Co. (Dkt. No. 6487). All three cases were heard by the same Hearing Examiner and decided by him on the same day.

The facts of this case, however, were vastly different from those in the other proceedings—as the Commission itself was later to find.

The complaint challenged as an unfair method of competition an agreement between respondents whereby Goodrich paid Texaco a commission for Texaco's services in promoting the sale of Goodrich's tires, batteries and automotive accessories ("TBA") to dealers and distributors selling Texaco gasoline.

1. The Examiner's First Initial Decision Found Texaco's Sales Commission Plan Lawful.

On October 23, 1959, some three and a half years after the complaint was filed and after two years of hearings, the Examiner handed down his first Initial Decision in which he rejected the underlying theory of the complaint. Specifically, he refused to find that "[c]ompeting manufacturers and/or distributors, wholesalers or other vendors of TBA products are foreclosed from a substantial portion of the TBA business of the Texaco petroleum outlet market as a

result of the override agreements between Texaco and the rubber companies" (JA 152). He also refused to find that "Texaco, by virtue of the relationship, contractual or otherwise, existing between it and station operators, consignees and distributors, handling its petroleum products, exercises control or influence over such outlets, thereby depriving them of freedom of choice as to their source of supply of TBA products and causing them to buy the TBA products of the respective rubber companies" (*ibid.*). Instead, he made specific findings to the contrary. In the light of these findings, the Examiner upheld the sales commission agreements. However, he issued an anti-coercion order against Texaco based on the testimony of five former Texaco dealers—a finding which the Court of Appeals later set aside, characterizing it as "extraordinary" in view of the overwhelming evidence to the contrary. 336 F.2d at 757, n. 1.

2. The First Commission Opinion Found No Basis in the Record for any Order Against Texaco.

On March 9, 1961, the Commission rendered its separate decisions in each of the three TBA cases. In both the *Atlantic-Goodyear* and *Shell-Firestone* proceedings, it found coercion, unlawful tie-ins, and adverse competitive effects resulting from the TBA sales commission agreements. In sharp contrast, in the *Texaco-Goodrich* case the Commission did not find coercion, tie-ins or anticompetitive effects. In the Commission's view, the legality of Texaco's sales commission contract with Goodrich turned upon its "competitive effects" (58 F.T.C. at 1178-79; JA 179). It concluded, however, that the record did not contain sufficient evidence "to enable the Commission to assess the competitive effects of the sales commission method of distributing TBA em-

ployed by these respondents" (58 F.T.C. at 1183; JA 186). Nevertheless, rather than dismissing the complaint for failure of proof, the Commission remanded the proceeding to the Examiner for the reception of additional evidence on competitive effects.

3. Texaco's Efforts to Bar the Remand Hearings

As soon as attempts were made to implement the remand order of March 9, 1961, Texaco and Goodrich brought an action against the Commission in the District Court for the District of Columbia, entitled *Texaco Inc.* v. *FTC*, Civil No. 2219-61. They contended that after at least nine years of investigation and trial, the Commission, having found the evidence insufficient to support its charges, was without authority or discretion to remand for the receipt of "further evidence" not shown to exist. An injunction was sought against further proceedings as being in excess of the Commission's authority, in derogation of the Commission's statutory duty to proceed with reasonable dispatch and in violation of the constitutional requirements of due process. In opposing this suit, counsel for the Commission represented that the Commission "needed additional evidence in order to decide the issues presented,"[7] and that the remand was not to be a retrial of what had gone before.[8] Relying on these representations, the Court denied a temporary injunction but on June 19, 1962 ruled that Texaco and Goodrich would be entitled to relief unless all further evidence

7. Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss and in Opposition to Plaintiffs' Motion for Preliminary Injunction, p. 26, served August 28, 1961.

8. Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment, pp. 17, 21, filed April 30, 1962.

was heard and the Hearing Examiner filed his decision by October 2, 1962. Subsequent attempts to obtain immediate temporary injunctive relief from the Court of Appeals and from this Court were unsuccessful. *Texaco Inc.* v. *FTC*, Appeal No. 17,111 (D. C. Cir. June 22, 1962); *Texaco Inc.* v. *FTC* (U. S. Sup. Ct. July 10, 1962; Black, J.). In each instance the tribunals were advised by Commission counsel that the remand was essential to develop needed additional evidence.

4. The Sham Remand Hearings

The remand hearings lasted 2½ days and closed on July 19, 1962 without any additional evidence having been adduced by Commission counsel. Instead of offering evidence, Commission counsel induced the Examiner to take official notice of certain matters in the Commission's opinion in the *Shell-Firestone* case. The Examiner brushed aside Texaco's plea that the doctrine of official notice did not permit shuffling evidence or findings from case to case, thereby cutting off the right of cross-examination and shifting the burden of proof. Subsequently, the Commission upheld Texaco on this point by eliminating from consideration anything adduced at the remand (JA 302-03), and the present Commission Order and Decision are in accord (Opinion, SJA 165; order, SJA 170, n. 3).

5. The Revised Initial Decision in Violation of the Commission's Mandate

The Examiner had been authorized only to receive "further evidence concerning the competitive effects of the respondents' practices" and to indicate what changes, if any, he wished to make in his first Initial Decision in light

of such evidence (58 F.T.C. at 1183; JA 174). Nevertheless, on September 24, 1962, without any additional evidence from Commission counsel, he filed a revised Initial Decision in which he added new findings and substituted new and contrary conclusions for those he had formerly reached. Now holding that the use of the sales commission method of distributing TBA violated Section 5 of the Federal Trade Commission Act, the Examiner issued a revised order which duplicated that entered by the Commission in the other two TBA cases.

6. The Second Commission Opinion

The "second round" appeal was orally argued before the Commission on April 4, 1963. Eleven days later, on April 15, 1963, the Commission handed down a 3-1 *per curiam* decision holding precisely the opposite of what it had held on March 9, 1961. Looking only to the pre-remand record, it sustained the Examiner's freshly minted conclusion that the sales commission agreements were unlawful. Without reviewing any evidence in its three paragraph opinion, the Commission ruled that the old record "amply supports the conclusions and the order of the hearing examiner" (JA 302). No basis for its reversal of position was set forth. As legal authority, the Commission merely cited its two other TBA decisions which it had handed down on the very day when it had earlier found the record in this case insufficient and had directed a remand.[9]

9. Commissioner MacIntyre did not participate. Commissioner Anderson, who was the only member of the Commission who had participated in its earlier decision, did not concur "for the reason that the command of the remand order of March 9, 1961 had not been met and complied with" (JA 303).

Before this second appeal to the Commission, the participation of Chairman Dixon, one of the members of the Commission majority, had been unsuccessfully challenged by Texaco. Prior to the remand hearings before the Examiner, Chairman Dixon, in a speech made on July 25, 1961, had publicly denounced the practices attacked by the complaint as illegal and had specifically named Texaco and Goodrich in this connection.

7. The First Decision of the Court of Appeals

On the appeal from the Commission's 1963 Decision, the Court of Appeals was unanimous in its judgment that "Chairman Dixon's participation in the hearing amounted in the circumstances to a denial of due process which invalidated the order under review," and held that the motion for his disqualification should have been granted (336 F.2d at 760, SJA 10-11).

With respect to the merits, a majority further held that there had been a failure of proof. It first ruled that coercion had not been proved (336 F.2d at 763; SJA 17), specifically finding that the record "demonstrates the contrary" of "coercive tactics" (336 F.2d at 762; SJA 15). Not only is it Texaco's policy "to respect the independence of its dealers," declared the Court, but such policy was followed in actual practice (*ibid.*).

Second, noting that under the Commission's view of the law an essential element of a Section 5 violation was Texaco's possession and exercise of controlling economic power over its dealers, the Court ruled that there was no

substantial evidentiary basis for any such finding (336 F.2d at 762; SJA 14).

Third, it inferentially ruled that no anticompetitive effects had been shown when it found that Texaco dealers "are quite free to accept or reject" Texaco's "recommendation" concerning TBA (336 F.2d at 763; SJA 16).

Finally, the Court held that the Commission's

> "* * * efforts in this case—fruitless after a dozen years—have exceeded permissible limits and have had unreasonably harassing and oppressive effects upon the companies under attack" (*ibid.*).

The Court concluded:

> "Because the Commission's drastic orders are not supported by the record as a whole and because of the undue protraction of the administrative process, we are of the opinion that this long drawn out proceeding should now be terminated" (*ibid.*).

8. *Atlantic* Case Taken to This Court

In making its determination concerning the absence of both coercion and the exercise of controlling economic power, the Court of Appeals was well aware of the Seventh Circuit's ruling on different facts in *Atlantic-Goodyear,*[10] which had been decided a few month earlier.

The record before the Seventh Circuit in the *Atlantic* case had literally seethed with evidence of Atlantic's coer-

10. *Goodyear Tire & Rubber Co.* v. *FTC,* 331 F.2d 394 (7th Cir. 1964).

cive practices *vis-a-vis* its dealers. In this context of overwhelming proof that Atlantic's dealers were being forced by Atlantic to act contrary to their wishes, the Seventh Circuit characterized them as "economic serfs" and affirmed the Commission's order.

In seeking review before this Court, Atlantic conceded that it had coerced its dealers and did not challenge the anti-coercion order. What Atlantic contested was the prohibition against the sales commission plan itself, arguing that such additional relief was unnecessary.

9. This Court's *Atlantic* Decision

Finding that Atlantic had successfully "marshaled its full economic power in a continuing campaign to *force* its dealers and wholesalers to buy Goodyear products" with a concomitant detrimental impact on competition (381 U.S. at 371; SJA 68; emphasis supplied), this Court sustained the order prohibiting Atlantic from being a party to TBA sales commission agreements. The Court held that such a prohibition was warranted because of the "long existence of the plan itself, *coupled with the coercive acts practiced by Atlantic pursuant to it.*" (381 U. S. at 372; SJA 70; emphasis supplied).

10. This Court's Disposition of This Case

While Atlantic's petition for certiorari was pending before this Court, the Government petitioned for certiorari in this case. It did not seek review of the dismissal of the anti-coercion order or of the decision disqualifying Chairman Dixon. Six days after announcing its decision in *At-*

lantic, on June 7, 1965, the Court granted the writ, and without passing upon the merits, directed that the judgment of the Court of Appeals be vacated and that the case be remanded to the Commission for further proceedings "in light of *Atlantic Refining Co.* v. *Federal Trade Comm'n*, 381 U. S. 357 (1965)." 381 U. S. 739, 740 (1965); SJA 89.

11. Proceedings Before the Commission After Remand

On remand from this Court, the Commission (Commissioners Dixon and MacIntyre not participating) rendered an opinion dated January 14, 1966 and issued an order identical to the one it had issued in *Atlantic*.

Although the purpose of the remand was to determine "whether the facts of record in the present case" bring it within the *Atlantic* rule, the Commission's Opinion eschewed factual analysis. Instead, it proceeded on the newly adopted legal premise that it is inherently unlawful for a "major" oil company to enter into a TBA sales commission arrangement with a "major" rubber company. Under this rule of *per se* illegality, the factual distinctions between *Atlantic* and the present case were deemed beside the point. To the Commission, it made no difference that Atlantic's dealers were forced against their will to purchase sponsored TBA and Texaco's dealers were not. The opinion explicitly disclaimed reliance upon any finding of coercion to support the Order (Opinion, SJA 172, n. 6).

12. The Fifth Circuit's Decision in *Shell*

By the time this case reached the Court of Appeals again on petitions to review filed by Texaco and Goodrich, the Fifth Circuit had decided Shell-Firestone.[11] In that

11. *Shell Oil Co.* v. *FTC*, 360 F.2d 470 (5th Cir. 1966).

case, Judge Wisdom rejected the Commission's contention that *Atlantic* had held that all sales commission agreements between major oil and rubber companies were unlawful *per se*, stating: "Courts must look to the record, at least to the extent the Supreme Court relied on the record in *Atlantic*" (360 F.2d at 479). According to Judge Wisdom:

> "The rationale for the *Atlantic* decision may be broken down into three essential components, each of which depends on the facts of the case before the court:
>
> (1) the oil company's dominant economic power over its dealers;
>
> (2) the exercise of that power over its dealers;
>
> (3) the anti-competitive effects of using that power" (*id.* at 477).

"[O]n the facts of the case before the Court," the Fifth Circuit held that the Shell-Firestone sales commission agreement had violated Section 5: "* * * the controlling facts in this case are so similar to those in *Atlantic* that the same result should be reached in both cases" (*id.* at 475).

13. The Second Decision of the Court of Appeals

When this case returned for a second time to the Court of Appeals, that Court addressed itself to the question

> "whether the Commission has complied with the remand order and correctly applied the applicable principles enunciated in the *Atlantic* holding" (App. A, p. 27).

Its unanimous conclusion, after a second full review of the record and with the benefit of the Fifth Circuit's *Shell* decision before it, was that the Commission had not.

Declaring itself in agreement with Judge Wisdom's view of *Atlantic* (App. A, p. 27), the court below scrutinized the record in this case in terms of the three essential components of the *Atlantic* rationale.

a. Existence of Dominant Economic Power

As to the first component—the "existence of dominant economic power"—the Court of Appeals revised its prior finding in light of *Atlantic* and, quoting from Judge Wisdom in *Shell,* held that such power was " 'inherent in the structure and economics of the petroleum distribution system' " (App. A, p. 29).

b. Exercise of Dominant Economic Power

But on the critical question of whether Texaco had *exercised* dominant economic power—the second essential element under *Atlantic*—the Court of Appeals adhered to its earlier determination that Texaco had not exploited its power to cause its dealers to purchase sponsored TBA.

At the outset, the Court noted that Texaco, unlike Atlantic, had not engaged in coercion. For this reason the Court of Appeals made clear that, wholly apart from the legality of Texaco's sales commission plan, there was no basis in law or fact for the anti-coercion provisions of the Commission's order (App. A, p. 40, n. 16)—a ruling on which petitioner does not seek review by this Court.

With respect to the legality of the plan itself, the court below advanced *two distinct theories* to support its conclusion that there had been no exercise of dominant economic power.

First, it noted that in Atlantic "coercion was found to have permeated the entire Atlantic program, contaminating even its neutral conduct" (App. A., p. 30). The Court of Appeals accordingly viewed "a finding of coercion [as] the threshold requirement of a determination of exercise of dominant economic power" (*ibid.*).

But the court below did not rest its decision on the absence of coercion. As an independent ground for its decision it found that Texaco had not even exercised dominant economic power over its dealers in a *non*-coercive way:

> "Of course we realize, as did Judge Wisdom in *Shell*, that the 'Company's use of its economic power through the sales commission plan to cause its dealers to buy sponsored TBA *even in the absence of overt coercion*.' can constitute an unfair method of competition and a violation of section 5, *Shell* at 482-83 [emphasis added]" (App. A, p. 31).

The Court then proceeded to meet head-on petitioner's argument that each of the "non-coercive practices" referred to in *Atlantic* are present in equal degree in this case (*ibid.*).

First, the Court emphasized the Examiner's finding that "Texaco dealers, unlike those of Atlantic and Shell, *were free to accept or reject sponsored products*" (*id.* at 32). Amplifying this critical distinction, the Court contrasted Atlantic's sales practices with Texaco's, noting that whereas Atlantic had put pressure on its dealers to "vigorously" represent and cooperate with Goodyear, Texaco had fol-

lowed a policy of permitting "each dealer to choose whatever brand TBA he desires" (*ibid.*).[12]

The Court cited other examples of fundamental differences in the two oil companies' sales commission programs: Atlantic's regular policy of "double teaming" and advance solicitation—which with Texaco were "isolated and sporadic" occurrences; Atlantic's TBA dealer quota and policing system—having no Texaco counterpart; Atlantic's restrictive credit card policy—as distinguished from Texaco's practice of permitting its dealers to charge *non*-sponsored TBA; and Atlantic's assignment of its dealers to a single Goodyear TBA supply point—while Texaco dealers were assigned to nobody, evidencing their freedom to deal with any supplier of their choice (*id.* at 34).

Summing up on this issue, the Court declared:

> "These few examples demonstrate a different set of facts between the Atlantic record and this case" (*ibid.*).

12. The significance of the different nature of the sales practices of the two companies is perhaps best demonstrated by the relative "effectiveness" of their programs. An Atlantic survey between 1946 and 1949 showed that 67% of its dealers preferred another brand of tires and 76% another brand of batteries. Yet in 1951, "[w]ithin seven months after the agreement Goodyear had signed up 96% and 98%, respectively, of Atlantic's dealers in two of the three areas assigned to it" (381 U. S. at 366; SJA 63). Two months later "an Atlantic report showed that *virtually all* Atlantic dealers in Goodyear's assigned territory who were potential purchasers of TBA had signed contracts agreeing to handle Goodyear products" (58 F.T.C. at 346).

In diametrical opposition, although Texaco's program had been in effect for well over a decade before Atlantic's was even commenced, the overwhelming number of Texaco dealers still did not regularly purchase *any* sponsored TBA: approximately two-thirds did not buy sponsored tires, and 80% did not buy sponsored batteries and accessories (JAX 177-80).

The court accordingly concluded that Texaco had *not* "exploited its service station market illegally for the benefit of itself and Goodrich" (*ibid.*).

c. *Anticompetitive Effects*

With respect to the third requirement—a showing of anticompetitive effects—the Court of Appeals approached the problem from the point of view of both interbrand and intrabrand competition. Once again the records in the two cases were entirely different. In *Atlantic*, interbrand competition had been snuffed out by reason of "a classic division of territories between Goodyear and Firestone," from which it followed that "Atlantic dealers could only buy at the prices designated by supplier to whom the territory had been allocated" (*id.* at 37). The *Texaco-Goodrich* record, *per contra*, "is devoid of evidence disclosing any form of territorial division" or "price dictation" (*ibid.*). As for the Commission's reliance on certain testimony that non-sponsored TBA suppliers had difficulty selling to Texaco dealers because the latter felt that they were required to buy the sponsored product, the Court for the second time rejected such evidence as atypical "isolated instances which were generally contradicted by overwhelming rebuttal evidence" (*id.* at 38).

With respect to intrabrand competition, whereas Atlantic's supply point system had the inevitable effect of precluding such competition, since Texaco had no such system, there was no parallel anti-competitive effect.

In the face of "the long standing Texaco policy that Texaco dealers are free to purchase any brand of TBA which they desire to sell" (*id.* at 37), the fact that Texaco dealers purchased substantial quantities of sponsored TBA did not constitute proof of the requisite adverse effect on competition.

In sum, the Court concluded that "while the record shows Texaco indeed has dominant economic power, it is fatally deficient on the crucial issues of exercise of that power and subsequent anticompetitive effects" (*id.* at 39-40). For this reason the Court rejected the Commission's position that it would be unfair to prevent Atlantic and Shell, but not Texaco, from using the sales commission plan:

> "We agree that it would be inequitable, and indeed a dereliction of the Commission's obligations, *provided* that all three were guilty of substantially equal violations of section 5. But simply because Texaco is in the same line of business does not mean it must suffer the pain of the misdeeds of other oil companies; this would indeed be guilt by association. We conclude that the record simply does not support a finding that Texaco violated the Act (*id.* at 39).

Confronted with the failure of proof in this case, the Court of Appeals recognized that

> "One course available to us would be to remand this case once again to the Commission to permit it to develop additional evidence for the record but the Commission and Examiner have had abundant opportunity —*and direct mandate*—to do this in the past and have not done so. We think the time has now come to termi-

nate these protracted proceedings and dismiss the complaint. * * * the Commission has now had more than an adequate opportunity to develop a record in support of its section 5 contentions *over a period of fourteen years*" (*id.* at 40; emphasis supplied).

Accordingly, it directed that the complaint be dismissed.

ARGUMENT

This Case Does Not Warrant Review.

There is no new question of law for the Court to decide in this case. The Court laid down the applicable legal principles in *Atlantic* and ordered that the facts of record here be evaluated in terms of those established principles. That has been done by the Court of Appeals. In doing so, it expressed its agreement with the Fifth Circuit's understanding of the *Atlantic* rationale. Hence there is no conflict among circuits. The only questions which could be reviewed here are questions of facts—a function which this Court should not be asked to perform—particularly in the circumstances of this case where the Commission has had its record reviewed not once, but twice, by the Court of Appeals. The very reasons which prompted then Solicitor General Marshall to oppose the petition for certiorari in the *Shell-Firestone* case militate against the grant of certiorari here.

In his Brief in Opposition in *Shell-Firestone*, the Solicitor General pointed out that the Fifth Circuit had held that Shell, although it had not overtly coerced its dealers to handle Firestone TBA, had nevertheless *exploited* its economic dominance over its dealers to cause them to purchase

the sponsored products with demonstrable anticompetitive effects, and that this exercise of power rendered the Shell plan an unfair method of competition. This holding, the Solicitor General contended, simply involved an application of the record facts to the standards articulated in *Atlantic*, and as such did not warrant Supreme Court review. In response to Firestone's request that the court decide "'whether there is substantial evidence to support the Commission's specific findings of fact' that Shell had economic power over its dealers, which it used to cause them to purchase substantial quantities of sponsored TBA," the Solicitor General stated:

> "The court of appeals fully reviewed the record on that issue, however, and upheld the Commission's findings as adequately supported, and there is no occasion for a second review of that factual issue." (Brief in Opposition, p. 15).

Surely the mere fact that the Court of Appeals, guided by the same legal criteria as the Fifth Circuit but reviewing a markedly different record, concluded that the Commission's findings were *not* supported by substantial evidence, does not make this case any more appropriate for Supreme Court review. The fact that the Court of Appeals came to that conclusion for the second time—after having the benefit of both this Court's *Atlantic* and the Fifth Circuit's *Shell* opinions—underscores that now at long last is the time to call a halt to this marathon litigation.

Petitioner argues that the court below misconceived the true import of *Atlantic* because it stated that "a finding of coercion is the threshold requirement of a determination of the exercise of dominant economic power" (Petition, p. 13).

This statement, respondents submit, is a correct reading of *Atlantic*, which rests on this Court's finding that Atlantic had successfully "marshaled its full economic power in a continuing campaign to *force* its dealers and wholesalers to buy Goodyear products" (381 U.S. at 371; emphasis added).

But it makes no difference whether coercion is a *sine qua non* to illegality under *Atlantic* because the court below rested ~~its~~ decision on an independently self-sufficient ground, namely, that Texaco did not exercise its economic power over its dealers *even without coercion* to cause them to handle sponsored TBA. The Court of Appeals explicitly stated: "Of course, we realize, as did Judge Wisdom in *Shell*, that the 'Company's use of its economic power through the sales commission plan to cause its dealers to buy sponsored TBA *even in the absence of overt coercion*' can constitute an unfair method of competition and a violation of section 5, *Shell* at 482-83 (emphasis added)." (App. A, p. 31). The Court then reviewed the record to show that Texaco did not engage in the *non*-coercive practices referred to in *Atlantic* and that Texaco dealers were entirely free to accept or reject sponsored products (see pp. 16-17, *supra*), a freedom which they exercised predominantly *against* the sponsored brands (see p. 17, *supra*, n. 12).

By the same token, the record in this case is markedly different from that in *Shell*. And the difference is basic to the question of legality.

A few of the differences between Shell's practices and Texaco's will demonstrate why the decisions of the Fifth

and District of Columbia Circuits are consistent as a matter of fact (as well as law).

1. "Shell promptly notifies Firestone (or Goodyear) and its local supply point of new Shell dealers. This permits Firestone to sign up the new dealer, and obtain his initial order, before competing TBA companies even learn his identity" (Government's Brief in Opposition, p. 8). Here, on the other hand, as the Court of Appeals pointed out: "the Commission itself * * * struck the Examiner's finding that Texaco 'salesmen were encouraged by [Texaco] management to write up orders for sponsored TBA without waiting for a formal request from a dealer' " (App. A, p. 33). And Texaco engaged in advance solicitation only on isolated occasions (*ibid.*).

2. "Once the new [Shell] dealer has made his selection, Firestone and Goodyear defer to the choice and no longer compete with each other for the station's business" (Government's Brief in Opposition, p. 8). Here, there was no division of Texaco dealer accounts by the rubber companies (*id.* at 37).

3. Under the Shell plan, "the chosen [rubber] company assigns the service station to a specific supply point and Shell urges the dealer to purchase all TBA from that assigned outlet. No sales commissions are paid to Shell on TBA purchases from non-designated supply points, even though the brand acquired may be the same" (Government's Brief in Opposition, p. 8). Here, there was no assignment of specific supply points. "[E]ach [Texaco] dealer did not buy exclusively from, and was not limited

to any particular supply point but was free to deal with any source he chose" (App. A, p. 34).

4. "Much of the promotional work directed towards the [Shell] dealers is performed by Firestone and Shell salesmen under a system of joint solicitation called 'double teaming'. *The companies acknowledged that this system, used throughout a dealer's term to encourage purchases of sponsored TBA and to discourage excessive merchandising of competing brands, is their most effective promotional device*" (Government's Brief in Opposition, p. 9; emphasis supplied). Here, "double teaming" was found to be an "isolated and sporadic" practice (App. A, p. 33).

5. "If Firestone salesmen encounter any resistance, their company will send a list of the recalcitrant dealers to Shell," and "Shell offers the services of its district salesmen to overcome pockets of dealer resistance" (Government's Brief in Opposition, p. 10). Here, there was no such policing of dealers. As the Court of Appeals noted: "In the original appeal to this Court, the Commission contended that the quota and policing system were also used by Texaco. In the present appeal the Commission has retreated from this position" (App. A, p. 34).

There is such a thing in litigation as a failure of proof. That is precisely what occurred here. The facts of record in this case simply cannot be forced into the *Atlantic* or *Shell* molds. And this Court should not be asked to force them. There is nothing in the nature of things that impels the conclusion that the Court of Appeals was wrong when it found that "Texaco dealers, unlike those of Atlantic and Shell, were free to accept or reject sponsored

products" (App. A, p. 32). While the petition implies disagreement with that salient finding (p. 17), this is hardly the type of question which this Court should be called upon to review. Indeed, petitioner recognizes as much, since it argues that the issue of dealer freedom is beside the point: "* * * the court's conclusion that Texaco dealers were 'free' to chose nonsponsored TBA * * * is in any event irrelevant * * *" (*ibid.*).

This is a far cry from the position that the then Solicitor General took the last time that this Court was urged to grant certiorari in this case. Then he contended:

> "The basic vice of the plan is that it amounts to an illegal tying arrangement under which Texaco *requires* its dealers, as a condition of maintaining that status, to purchase Goodrich and Firestone TBA" (1964 Petition, p. 15; emphasis added).

Underscoring his point that the test was whether Texaco had obliged its dealers to make purchases contrary to their will, the Solicitor General told this Court in 1964:

> "The sales commission agreements with Goodrich and Firestone were responsible for Texaco's exercise of its power to *compel* its dealers to buy those companies' TBA" (*id.* at 18; emphasis added).

The Solicitor General was not using words carelessly in 1964. He took precisely the same position on oral argument before this Court in *Atlantic*, when he specifically disclaimed any contention that the sales commission arrangement was inherently unlawful. Thus the Court was advised:

> "* * * if you had just the contract standing alone, you could not say on its face that this is bad, it de-

pends on what they would do about it." (Transcript of Oral Argument Before Supreme Court, *Atlantic Refining Co.* v. *Federal Trade Commission*, p. 72.)

In this connection Justice Brennan observed:

> "* * * there is no contention of the Government that the sales commission contract in and of itself ran afoul of such a provision [Section 5], it is only the performance under the contract, the method of operation." (*id.* at 80).

The Solicitor General agreed with Justice Brennan that:

> "* * * the Government does not suggest that there may not be commission sales arrangements which would satisfy Section 5." (*id.* at 80).

The Solicitor General informed the Court that he was not contending that economic power alone was sufficient to invalidate the plan. In other words, he declined to advocate the Seventh Circuit's notion that "recommendation is tantamount to command."

> "Justice White: * * * That is the real nub of your argument, I gather, that companies can't recommend and at the same time have this power.
>
> "Mr. Friedman: They can't recommend it *in the way in which they recommend it here.* I think again it is a matter of degree basically" (*id.* at 81) (emphasis supplied).

The Solicitor General made it clear that he was not asking the Court to predicate illegality upon the fact that there was a disparity of economic power between Atlantic and any of its dealers but rather upon the improper exercise of such power—not upon the mere existence of Atlantic's

leases but rather upon the improper use to which Atlantic put them. Thus counsel stated:

> "* * * in this case we have the power and its use" (*id.* at 52).
>
> * * *
>
> "[T]he basis on which the Commission's decision holding the Atlantic contract to be invalid rests is the power that Atlantic has, *and the fact that in these circumstances the power is brought to bear*" (*id.* at 82) (emphasis supplied).

In speaking of the exercise of power, the Solicitor General emphasized that he was referring not to salesmanship but to pressure and coercion:

> "* * * in this case we have the power and its use. I don't think I have to take on the more difficult case, *if we didn't have the actual use of the power.*
>
> "Justice Brennan: The power and the use with pressure, not power and the use meaning coercion?
>
> "Mr. Friedman: *Power and use meaning pressure, with some coercion*" (*id.* at 52) (emphasis supplied).

Upon further questioning, counsel reaffirmed the importance of Atlantic's use of its power:

> "Justice White: And he [the Atlantic dealer] is coerced?
>
> "Mr. Friedman: He is coerced, he is coerced in fact" (*id.* at 56).
>
> * * *
>
> "Justice Stewart: The pressure put upon them?
>
> "Mr. Friedman: Coercive pressure, threats of lease cancellation" (*id.* at 58).
>
> * * *
>
> "Justice Stewart: They were under coercion?
>
> "Mr. Friedman: They were under coercion" (*ibid.*).

The Solicitor General stressed that it was the totality of Atlantic's improper conduct which caused the proven anti-competitive effects:

> "If I may, I would like to show what they actually did in this case, and then to suggest why there may very well be situations where *eliminating some of the things they did in this case would not have the same adverse effect on the competition* as the plan the Commission condemned" (*id.* at 48-49) (emphasis supplied).

Far from being "irrelevant," the conclusion of the Court of Appeals in this case that "Texaco dealers were 'free' to choose non-sponsored TBA" is dispositive. Dealer freedom is the very antithesis of exercise of economic power in one market to subvert competition in another. Such freedom negates anticompetitive foreclosure, which presupposes the exercise of power to prevent competitors from gaining access to a market. Since Texaco dealers were entirely free to select their own TBA suppliers, it is a contradiction in terms to say that there was foreclosure.

Lest we be misunderstood, we are not claiming that there must be total foreclosure of all Texaco dealers in order to establish a Section 5 violation. Our point is that there was no foreclosure at all in this case. *All* Texaco dealers were free to buy from TBA suppliers of their own choosing. To the extent that they elected to buy sponsored TBA—and it was a minor extent—their choice cannot be ascribed to an exercise of Texaco's economic power. After all, these sponsored products were among the leading brands of TBA; they were highly advertised; they had great consumer acceptance. Hence, the fact that they

were purchased in substantial quantities by certain Texaco dealers cannot convert their free election to do so into a wrongful exercise of economic power by Texaco.

Petitioner suggests that it is discriminatory to prevent Atlantic and Shell from using sales commission agreements if Texaco is free to do so (Petition, p. 11). The shoe is on the other foot. It is discriminatory to outlaw Texaco's use of the sales commission plan just because Atlantic and Shell have abused the privilege. The fact that all three are characterized as "major" oil companies hardly makes the question of individual "innocence" or "guilt" any less personal. That is why separate hearings were held in the three TBA cases, that is why the Commission ruled that evidence received in one proceeding could not be considered in another, and that presumably is why the Commission has not proceeded against other "major" oil and rubber companies which have sales commission agreements.

When all is said and done, petitioner cannot prevail in this case unless it is unlawful *per se* for Texaco and Goodrich to be parties to a sales commission agreement. This is not the rule that the Solicitor General sought in *Atlantic*. Nor is it the rule that this Court handed down. Both the Fifth Circuit and the court below are in total agreement on this point. Manifestly, there would have been no reason for this Court to have ordered a remand here for consideration of the record in light of the principles announced in *Atlantic* if *Atlantic* laid down a rule of *per se* illegality.

The Court of Appeals, unlike the Commission, did exactly what this Court directed it to do: it applied the principles of *Atlantic* to the facts of record.

Conclusion

The decision of the Court of Appeals in this case, involving as it does an application of the facts to law already settled by this Court, presents no new issue of general public importance. Nor does it conflict in legal principle or approach with any decision of another Court of Appeals. No question can properly be presented here other than one of fact. Review of the facts is the responsibility of the Court of Appeals, which has now discharged its obligation for the second time in this matter. This is a classic example of the type of case with which this Court should not be burdened.

Respectfully submitted,

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